LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 8 1970
JOHN F. DAVIS, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1044

GEORGIA HIGHWAY EXPRESS, INC.,
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent,*

and

TRUCK DRIVERS & HELPERS LOCAL No. 728,
*Intervenor.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALEXANDER E. WILSON, JR.
615 Rhodes-Haverty Building
Atlanta, Georgia 30303
*Counsel for Petitioner*

Of Counsel:

WILSON, BRANCH AND WILCOX
615 Rhodes-Haverty Building
Atlanta, Georgia 30303

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030
1-5-70—50

## INDEX


Opinions Below ..... 2
Jurisdiction ..... 2
Questions Presented ..... 2
Statutes Involved ..... 3
Statement of the Case ..... 5
Reasons for Granting the Writ ..... 9
Conclusion ..... 14
Appendix A—(Court of Appeals' Opinion) ..... A1
Appendix B—(Court of Appeals' Order on Petition for Rehearing) ..... A9
Appendix C—(Decision and Order of NLRB) ..... A11


### Citations

CASES


*Georgia Highway Express*, 165 N.L.R.B. No. 80 (1967) ..... 6, 10
*Morgan* v. *United States*, 304 U.S. 1, 18 (1938) ..... 11
*N.L.R.B.* v. *Bata Shoe Co.*, 377 F.2d 821 (4 Cir. 1967) ..... 12
*N.L.R.B.* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965) ..... 13
*N.L.R.B.* v. *Ortronix, Inc.*, 380 F.2d 737 (5 Cir. 1967) ..... 13
*Office of Communications of the United Church of Christ* v. *F.C.C.*, ..... F.2d ..... (D.C. Cir. 1968), Slip Opinion No. 19,409, dated June 20, 1969 ..... 10
*Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292 (1937) ..... 12
*Teamsters Local 728* v. *N.L.R.B.*, 403 F.2d 921 (D.C. Cir. 1968) ..... 6
*Teamsters Local 728* v. *N.L.R.B.*, 415 F.2d 986 (D.C. Cir. 1969) ..... 9
*U. S. Rubber Co.* v. *N.L.R.B.*, 373 F.2d 602 (5 Cir. 1967) 13

## STATUTES

Labor Management Relations Act, 1947—
Sec. 9(c), 29 U.S.C. Sec. 159(c) ..... 3
Sec. 10(b), 29 U.S.C. Sec. 160(b) ..... 4
61 Stat. 136 ..... 3
National Labor Relations Act, Sec. 9(c), 49 Stat. 449 (1935) ..... 3

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. .....

GEORGIA HIGHWAY EXPRESS, INC.,
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent,*

and

TRUCK DRIVERS & HELPERS LOCAL No. 728,
*Intervenor.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, GEORGIA HIGHWAY EXPRESS, INC.,[1] respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on September 8, 1969.

The Petitioner filed a Petition for a Rehearing in this case, and the Court of Appeals denied this petition on October 10, 1969.

1. Georgia Highway Express, Inc. will be hereinafter referred to as the "Employer".

## OPINIONS BELOW

The Decision of the Court of Appeals (Appendix A, infra, pp. A1-A8) is reported at 415 F.2d 986, but the Order of the Court of Appeals denying the Petitioner's Petition for Rehearing (Appendix B, infra, pp. A9-A10) is not yet reported. The findings of fact, conclusions of law, and Order of the Board (Appendix C, infra, pp. A11-A26; TR.[2] pp. 176-190), 171 N.L.R.B. No. 111, is not yet reported.

## JURISDICTON

The Decision of the Court of Appeals was entered on September 8, 1969. (Appendix A, infra, p. A1). On October 10, 1969, the Court entered an Order denying the Petitioner's Petition for Rehearing. (Appendix B, infra, p. A10). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(c).

## QUESTIONS PRESENTED

Did the Court below err in affirming a decision of the National Labor Relations Board in which the Board found that the Employer had illegally refused to bargain with a union in a case in which the Employer had been denied a hearing after the Board had certified a union without granting the Employer a hearing on factual issues that were determinative of the Union's status as a certified bargaining representative?

---

2. "TR." refers to the Appendix of the Parties in the Court below.

## STATUTES INVOLVED

A. Section 9(c) of the Labor Management Relations Act, 1947, as amended 61 Stat. 136; 29 U.S.C. 151, 159, provides in part as follows:

> "(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> "(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
>
> "(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

B. Section 9(c) of the National Labor Relations Act of July 5, 1935, 49 Stat. 449, formerly provided:

> "(c) Whenever a question affecting commerce arises concerning the representation of employees, the

Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

C. Section 10(b) of the Labor Management Relations Act, 1947, as amended, 61 Stat. 136; 29 U.S.C. 151, 160, provides in part as follows:

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have the power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint; . . . The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934. . . ."

## STATEMENT OF THE CASE

This dispute dates back to the night of April 12, 1966. At that time forty-nine (49) unorganized employees walked off their jobs in what was later determined to be an economic strike. (TR. 87). The walk-out spread, but around Noon on April 13, an undetermined number of employees, through a spokesman made unconditional requests for reinstatement. (TR. 88-89). During the following week some of the strikers were rehired, but others were not. (TR. 90-91).

On April 20, 1966, Truck Drivers & Helpers Local No. 728[3] filed a petition for a National Labor Relations Board election in what was to become Case No. 10-RC-6679. A hearing was held in this case on May 10, 1969, and the Board's Regional Director for the Tenth Region determined after a full and complete hearing that those strikers who had not been reinstated as of the date of the hearing did not have a reasonable expectancy of reemployment and that they were ineligible to vote in the election to be held on June 29, 1969. (TR. 14).

An unfair labor practice proceeding ensued on June 13, 1966, wherein the Employer was charged with violating Section 8(a)(1) of the National Labor Relations Act by wrongfully denying reinstatement after an economic strike to various named individuals. Only forty-seven (47) individuals were named in the Complaint as having been denied reinstatement because of their union activities.

On June 29, 1966, an election was held at the Employer's Atlanta terminal, in which there were one hundred twenty-two (122) votes cast for the Union, one hundred sixty-three (163) votes cast against the Union, and sixty-

3. Truck Drivers & Helpers Local No. 728 is hereinafter referred to as the "Union".

seven (67) votes were challenged. The Union filed Objections to the Conduct of the Election. On September 21, 1966, the Union amended the charge in Case No. 10-CA-6581 to conform the names listed in the charge to the challenged ballots.

Without hearing, the Regional Director, on September 30, 1966, issued a Supplemental Decision in the representation case holding the Objections to be without merit, but finding that fifty-seven (57) of the challenged ballots were cast by persons who participated in the work stoppage on April 12 and April 13. (TR. 69-77). The Regional Director made no decision on the fifty-seven (57) challenged ballots, deferring decision until there was a disposition of the unfair labor practice case.

A hearing was held in the unfair labor practice case beginning on November 28, 1966. Eventually, the Board issued a Decision in which it adopted the findings of the Trial Examiner, who held that the Employer did not meet its burden of proving that former strikers had been permanently replaced or that the Employer had no need for them. (TR. 105). This decision of the Labor Board was enforced by the United States Court of Appeals for the District of Columbia Circuit. *Teamsters Local 728* v. *N.L.R.B.*, 403 F.2d 921 (D.C. Cir. 1968).

Without hearing, and relying entirely on the Decision of the Board in *Georgia Highway Express, Inc.*, 165 N.L.R.B. No. 80, the Regional Director on October 12, 1967, declared that the fifty-seven (57) challenged ballots represented eligible voters and ordered that these ballots be opened and counted. (TR. 118-119).

The Regional Director made this decision, although there was never any evidence presented as to who the individual employees were who were represented by the spokesman who sought reinstatement on April 13, 1966.

Furthermore, there was never any hearing at which evidence could be presented with regard to the status of these fifty-seven (57) employees on the eligibility date for the election. There was no evidence taken with regard to whether or not they had become reemployed in permanent positions with other employers by that date.

Thereafter, the Employer made repeated requests to be given an opportunity to place evidence in the record on the eligibility of individual voters who cast challenged ballots on the date of the election. The Employer's attorney wrote to the Regional Director and reminded him that many questions existed concerning the challenged ballots which were not in issue in the unfair labor practice case, and he requested a hearing in the representation case. (TR. 103).

On July 14, 1967, the Employer's attorney wrote to the Regional Director requesting that the record be reopened so that evidence pertaining to the hiring of replacements and the reasonable expectancy of reemployment of those who had cast challenged ballots could be determined. (TR. 110).

The Regional Director eventually opened the challenged ballots without providing any hearing to the Employer. The Employer went forward and attempted to place the issue before the National Labor Relations Board, but the Board, as the Regional Director, dealt cavalierly with the Employer's demands for a hearing and stubbornly refused to grant one. In a Request for Review of the Regional Director's Second Supplemental Decision and Order to Open and Count Challenged Ballots dated October 12, 1967, the Employer urged there was no evidence to support a finding that employees had requested reinstatement at a time the positions were available for them. (TR. 126-127). Later the Employer filed a "Motion of Em-

ployer to Reopen the Record and to Set Aside Second Supplemental Decision and Order to Open and Count Challenged Ballots". In this Motion the Employer maintained:

> "At the very least the record in the instant case should be reopened by the Regional Director so that the Employer may have an opportunity to bring forward any time cards or other documents which would provide further evidence of the status of the alleged discriminatees on the date for the election." (TR. 129).

Throughout the proceedings in the representation case, the Board dealt with the Employer's requests for a hearing as though the unfair labor practice case had disposed of the issues which the Employer raised in his continued requests for a hearing. The Board took this position although the Trial Examiner in Case No. 10-CA-6581 had developed an Order which required the Employer to maintain time cards and other records so the status of employees after April 12, 1966, could be determined during the compliance stages of the unfair labor practice case. (TR. 98).

This Decision clearly showed that the status of the employees as of the eligibility date of the election was not determined in the unfair labor practice case. This factual issue had not been determined when the Board decided that those casting challenged ballots were entitled to vote in the election.

After the challenged ballots were counted, the Union had received a majority of the ballots which were cast in the election. The Regional Director, Region Ten, then certified the Union as the bargaining representative of a group of the Employer's employees. Because of the irregular election procedure, the Employer eventually refused to bargain with the Union. Thereafter, the Union filed an unfair labor practice charge against the Employer

in which it alleged that the Employer had refused to bargain with the Union.

The National Labor Relations Board's General Counsel filed a Motion for Summary Judgment in the second unfair labor practice case. The Employer continued to demand a hearing in the case, but was denied a hearing; and the Motion for Summary Judgment was granted because the Employer admitted refusing to bargain with the Board's certified bargaining representative. This was the only action the Employer could take in order to obtain judicial review of the Board's decision to determine the issues in the unfair labor practice case without granting the Employer a hearing.

The United States Court of Appeals for the District of Columbia Circuit reviewed this Decision, and it entered an Order enforcing the Board's Decision. *Teamsters Local 728 v. N.L.R.B.*, 415 F.2d 986 (D.C. Cir. 1969). (Appendix A, infra, pp. A1-A8).

In its Decision, the Court of Appeals apparently held that an employee's reasonable expectancy of reemployment on April 13, 1966, was the same as his expectancy of reemployment on the date of the election, which was held over two months later. The Court also held that the Employer's repeated demands for a hearing in the election case on the issue of the status of the alleged discriminatees on the date of the election was too "vague and bare" to show that the Board abused its discretion either in denying review of the certification order or in granting summary judgment in the Section 8(a)(5) proceedings.

## REASONS FOR GRANTING THE WRIT

In a recent decision the United States Court of Appeals for the District of Columbia Circuit outlined the minimal standards of fairness which must be presented in an ad-

ministrative hearing. *Office of Communications of The United Church of Christ* v. *F.C.C.*, ..... F.2d ..... (D.C. Cir. 1969). Slip Opinion No. 19,409, dated June 20, 1969. In that case the Court rebuked the Federal Communications Commission for its "impatience and hostility" toward the intervenors in that case. The Court also held that an administrative agency has a duty to conduct an objective investigation of all of the facts when pursuing its regulatory function.

The United States Court of Appeals for the District of Columbia Circuit failed to follow its reasoning in the *Church of Christ* case, *supra*, when it decided the instant case three days later. The reasoning in the prior case demanded that the Court of Appeals remand the *Georgia Highway* case to the National Labor Relations Board, so that the Board would hold a hearing to determine the status of employees who cast challenged ballots on the date of the election in question. Instead of doing this, the Court championed the Labor Board's decision not to grant Georgia Highway Express a hearing with regard to critical factual issues which had never been investigated at a Board hearing. Although the Court was chagrined at the impatience which the Federal Communications Commission showed in dealing with intervenors in the *Church of Christ* case, *supra*, the Court found that the Labor Board could deny a party a hearing for the sake of expediency in clearing the agency's calendar.

The Petitioner urges that the Supreme Court should review this case in order that it may clearly define the responsibility of administrative agencies to meet the minimal requirements of due process under the Fifth Amendment to the Constitution of the United States.

This Court has held:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise, the right may be but a barren one. Those who are brought into contest with the government in quasi-judicial proceedings aimed at the control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon its proposals before it issues its final command." *Morgan* v. *United States*, 304 U.S. 1, 18 (1938).

Clearly, the Labor Board has not met this standard in the instant case. A hearing was held in Case No. 10-RC-6679, in which it was determined that those employees who had engaged in the strike on April 12 and April 13 and who had not been reinstated to their jobs as of the date of the hearing did not have a reasonable expectation of reemployment. At that hearing the Employer was able to place evidence in the record in order to react to the arguments which were presented by the Union.

Thereafter, the Regional Director determined that the status of fifty-seven (57) individuals who had cast challenged ballots would be affected by the decision of the Labor Board in Case No. 10-CA-6579. In that case, the Trial Examiner determined that the Employer had wrongfully failed to reinstate some of those strikers who had applied for reinstatement on April 13, 1966. In his Decision, the Trial Examiner left determinations as to when employees should have been entitled to reinstatement up to the compliance stage. He also left issues pertaining to whether or not employees had lost wages or had, in fact, covered their losses by accepting permanent employment in other places to the compliance stage of the proceedings.

Despite the fact that the Trial Examiner had made no determination with regard to the status of employees who had cast challenged ballots as of the date of the election, the Regional Director determined, based upon the prior hearing, that those who were denied reinstatement were eligible to vote in the election on June 22, 1966. The status of the employees on April 13, 1966, was not determinative of these voters on the eligibility date of the election, and it violated the Employer's right to due process when this second factual issue was determined without a hearing. *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U.S. 292 (1937).

In this case Georgia Highway was not given a reasonable opportunity to know the claims of the opposing party and to meet them, Georgia Highway was never fairly advised of what the government proposed, and it was not heard upon the Board's proposals before the Board issued its final command.

The position of the Employer is the same as that expressed by Circuit Judge Bryan in his concurring opinion in *N.L.R.B.* v. *Bata Shoe Co.,* 377 F.2d 821 (4 Cir. 1967). In his concurring opinion, Judge Bryan said:

> "When the Court found, as it has, that the objections and exceptions of Bata were not frivolous, but nevertheless, have been disposed of *ex parte*, then the Court should have immediately set aside the Board's order. Not only is this a clear refusal of due process; it was irredeemable under the Board's established procedures. A post-decision 'hearing' hardly fulfills the 'hearing at some stage of the proceedings' now demanded by the Court and by the precedent it cites. . . .
>
> "In consequence a court cannot properly enforce an order finding an employer guilty of an unwarranted refusal to bargain with a union certified in an election if it appears, with respect to challenges affecting the

result, either that they were disposed of erroneously as a matter of law or that the employer raised 'substantial material factual issues' under the regulations and was denied the hearing that he seasonably requested." ibid. at 834.

In the instant case the court below should not have enforced the order of the Board, since the Employer was denied a hearing that it seasonably requested in order to show that challenges affecting the results were disposed of erroneously as a matter of law. The Employer raised substantial material and factual issues under the Board's regulations, but it was denied a hearing.

Where there exists material and substantial question of fact, a Motion for Summary Judgment cannot be granted, because a hearing must be held. *U. S. Rubber Co.* v. *N.L.R.B.*, 373 F.2d 602 (5 Cir. 1967); *N.L.R.B.* v. *Ortronix, Inc.*, 380 F.2d 737 (5 Cir. 1967).

In the instant case, the United States Court of Appeals for the District of Columbia Circuit has enforced a Board Order which was granted in an unfair labor practice case in which a summary judgment was made, although there were substantial factual issues involved in the case. This decision came after the Regional Director had changed an earlier decision without articulating the reasons for his decision in the representation case. This action by the Regional Director clearly violated this Court's ruling that the Board must articulate the reasons for its decisions. *N.L.R.B.* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965). In view of the foregoing factors, it is urged that this Court must review the Decision of the United States Court of Appeals for the District of Columbia Circuit in the instant case, because this Decision has created serious inroads into the rights of a party to "due process" after being brought before an administrative agency of the United States Government.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Wilson, Branch and Wilcox

Alexander E. Wilson, Jr.
*Counsel for Petitioner*

615 Rhodes-Haverty Building
Atlanta, Georgia 30303
Telephone: (404) 524-3611

# APPENDIX

## APPENDIX A

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

**No. 21,969**

TRUCK DRIVERS AND HELPERS LOCAL No. 728, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent
GEORGIA HIGHWAY EXPRESS, INC., Intervenor

---

**No. 22,095**

GEORGIA HIGHWAY EXPRESS, INC., Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent
TRUCK DRIVERS AND HELPERS LOCAL No. 728, Intervenor

---

Petitions for Review and Cross-Petition for Enforcement of an Order of the National Labor Relations Board

---

Decided June 23, 1969

*Mr. Herbert S. Thatcher,* with whom *Mr. Robert L Mitchell* was on the brief, for petitioner in No. 21,969 and intervenor in No. 22,095

*Mr. John W. Wilcox, Jr.,* with whom *Mr. Alexander E. Wilson, Jr.,* was on the brief, for petitioner in No. 22,095 and intervenor in No. 21,969.

*Mr. Elliott Moore,* Attorney, National Labor Relations Board, with whom *Messrs. Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, and *Marcel Mallet-Prevost,* Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Before Bazelon, *Chief Judge,* Prettyman, *Senior Circuit Judge,* and Leventhal, *Circuit Judge.*

Per Curiam: Georgia Highway Express, Inc. (Company) and Truck Drivers & Helpers Local Union No. 728 (Union) bring these petitions to review certain aspects of an order of July 17, 1968, of the National Labor Relations Board. The order upheld the certification of the Union as bargaining agent for the Company's Atlanta Terminal employees, and directed the Company to bargain and to post a notice as to the Board's order. The Board denied the intervenor Union's motion for counsel fees and other extraordinary relief. We think the Board's order sound in all respects and grant enforcement.

1. The Company complains in essence of the Board's application of the doctrine of estoppel whereby the determination of the "employee status" of certain individuals in an unfair labor practice proceeding was held conclusive of their status for the purpose of determining the eligibility of their votes for the representation election.

This dispute dates back to April 2, 1966. At that time some fifty of the Company's then unorganized employees walked off the job in economic protest. The walkout spread, but by noon of April 13, the employees, through a spokesman, made unconditional offers for reinstatement. During the following weeks some of the strikers were rehired; others were not. An unfair labor practice proceeding ensued wherein the Company was charged with violat-

ing section 8(a)(1) of the Labor Act by denying reinstatement to various named individuals.[1] These charges were resolved adversely to the Company and this court has ordered that the Board's order be enforced.[2]

The controversy before us centers on the estoppel effect of the determination of the unfair labor practice dispute to the election which was held on June 29, 1966. One week after the walkout, on April 20, the Union filed a petition for an election. The election proceedings have been the subject of numerous pleadings before the Board and the Regional Director, and the Regional Director has issued three opinions in the matter of the challenges to various ballots. The focus of this petition is the challenge to fifty-seven ballots based on the status of the voters, who were individuals who had participated in the April 12-13 walkout. The election outcome depends on the validity of these contested votes.[3]

On September 30, 1966, the Director deferred ruling on the matter pending the resolution of the unfair labor practice charges that had been filed by the Union in June 1966.[4] Following the Board's decision of June 19, 1967, the Regional Director ordered that the fifty-seven ballots be opened and counted in view of the Board's determination that the striking individuals should receive back pay and reinstatement. The Board denied the Company's petition for review of the Regional Director's ruling and the Director certified the Union on November 9, 1967. The in-

1. *See* 29 U.S.C. §§ 151 et seq. (1964). The complaint also charged a violation of section 8(a)(3). Neither the Trial Examiner nor the Board found it necessary to reach the issue as to § 8(a)(3).

2. Enforcement was granted in No. 21082 and 21272. Truck Drivers & Helpers Local No. 728 v. NLRB, ..... U.S.App.D.C. ....., 403 F.2d 921, *cert. denied*, 393 U.S. 935 (1968).

3. A total of sixty-seven ballots were under challenge.

4. The General Counsel filed a complaint on October 5, 1966.

stant proceedings arise out of the Company's refusal to recognize and bargain with the Union based on the November 9 certification. The General Counsel filed an 8(a)(5) complaint and moved for summary judgment. The Board granted the motion and denied the Company's request for a hearing.

2. There is sound scope for principles of estoppel in administrative adjudications.[5] There is no reason why an agency any more than a court should be required to squander limited and over-taxed resources of decisional and staff personnel by reconsidering matters already fairly heard and determined.[6]

In the case before us the application of the principles of estoppel was well within the Board's discretion. Both the unfair labor practice proceeding and the representation proceeding involved what was in essence the same key question, whether the involved individuals had the status of "employees" for the purpose of the Labor Acts. The question of eligibility to vote turns on whether an individual is employed or has a reasonable expectation of reemployment with a company.[7] The issue in the unfair labor practice proceedings involved additional issues of the status of the individuals named in the complaint, whether they had

---

5. *See* Pacific Seafarers v. Pacific Far East Line, U.S. App.D.C. , 404 F.2d 804 (1968), *cert. denied*, 393 U.S. 1093 (1969).

6. We recently had occasion to note the calendar congestion that plagues judicial dockets in an opinion extending the application of estoppel beyond the boundaries built of technical rules of mutuality. *See* Lober v. Moore, D.C. Cir. No. 21830 (March 18, 1969). That administrative agencies groan under a similar burden has been recognized in this court's opinions. *See e.g.* Rio Grande Radio Family Fellowship, Inc. v. FCC, U.S.App.D.C. , 406 F.2d 664 (1968).

7. *See* NLRB v. Atkinson Dredging Co., 329 F.2d 158, 162 (4th Cir.), *cert. denied*, 377 U.S. 965 (1964); The Marley Co., 131 N.L.R.B. 866, 869 (1961).

been permanently replaced or otherwise eliminated from the Company's payrolls for valid reasons.[8]

The Trial Examiner whose findings in the 8(a)(1) hearings were adopted by the Board and incorporated in a decision and order enforced by this court,[9] found that the fifty-seven individuals named in the General Counsel's complaint had not been replaced and were entitled to reinstatement as of the noon offer to return to work.

It would of course have been a valid defense if the Company had contended before the Board in the prior (unfair labor practice) proceeding that some or all of the individuals were not entitled to a Board remedy because they were not employees and had never been on the payroll.[10] We think the Company is foreclosed from raising this defense for the first time in the subsequent (election) proceeding before the Board or its Regional Director. The 8(a)(1) proceeding was a full-fledged, adjudicative determination made after evidentiary hearing.[11]

This is not a case where a party could claim it could not fairly surmise the import of litigation for future controversies. The Company was on express notice that the

---

8. *See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); NLRB v. Great Dane Trailers, 388 U.S. 26, 34 (1967).

9. Truck Drivers & Helpers Local No. 728 v. NLRB, U.S.App.D.C. ....., 403 F.2d 921 (1968), *cert. denied*, 393 U.S. 935 (1969).

10. While the Company appears to argue that no finding was made that the named persons were employees of the Company before the strike, that finding is implicit in the Board's decision and order which directed the Company to reinstate the as yet unhired workers and award back pay to those whose reemployment had been unlawfully postponed.

11. There may be less scope for estoppel doctrine where the failure to "litigate" an issue came in an earlier representation proceeding, where prompt disposition is a key objective, and there is no adversarial proceeding with full procedural incidents of adjudicative determination.

eligibility decision was being deferred pending the 8(a)(1) hearings. It cannot complain because it is bound by a determination on an issue which it chose to concede.

An additional question might have been raised in the later proceeding, that individuals who were held by the Board to be employees as of April 13, were later reemployed elsewhere, or for other reasons were no longer actually employed as of the June 1966 eligibility for balloting. No such issue of change in status subsequent to April 13 was the subject of either a meaningful proffer to the Trial Examiner, or focused contention presented to the Regional Director or the Board. The submissions were devoid of any suggestion that the Company could or would supply evidence that the status of certain individuals had changed from April to June. The Company's offer to present additional evidence alluded only to evidence to "show that the employees were replaced and had no reasonable expectancy of reemployment at the time of election,"—wording also applicable to persons claimed to be without employee status on April 13.

The Company's position is not advanced by a motion which asked that "the record be reopened so that the employer may have an opportunity to bring forward any time cards or other documents which would provide further evidence of the status of the alleged discriminatees on the eligibility date for the election." The vague and bare assertion contained neither an allegation as to specific employees, nor an indication that what the Company had in mind was evidence of a change in status of employees subsequent to April 13. These papers are not sufficient to show that the Board abused its discretion in denying review of the certification order or granting summary judgment in the 8(a)(5) proceedings.[12]

12. *Compare* NLRB v. Atkinson Dredging Co., *supra* note 6 at 164.

We see no merit in the Company's alternative contention seeking to avoid estoppel on the ground that its burden is not the same in the two proceedings. In some situations such a point may be material. *Cf. Brightheart* v. *McKay*, D.C. Cir. 21813 (April 9, 1969). Here, however, burden of proof was on the Board in the unfair labor practice proceeding, and hence there is no unfairness to the Company in this regard. While the burden of coming forward with evidence to show justification for the dismissal was put on the Company, this of course arose only after the General Counsel made a prima facie case of violation. There is no merit in the suggestion that although the Company was rightly held responsible in an 8(a)(1) proceeding for reinstatement of the employees with back pay, it has a basis for now arguing they were ineligible to vote in the selection of union representatives.

Application of the doctrine of estoppel is in furtherance of the Congressional objective of expeditious enforcement of Board decrees, assuring compliance with fair procedures. "To require that the Board reopen and reconsider a matter that was subject to prior consideration would unnecessarily prolong the controversy, and prevent the orderly settlement of labor" disputes. *NLRB* v. *Tennessee Packers, Inc.*, 379 F.2d 172, 180 (6th Cir.), *cert. denied*, 389 U.S. 958 (1967). We conclude that Georgia Express has "had its day in court" and that the Board did not abuse its discretion in granting the General Counsel's motion for summary judgment in this unfair labor practice proceeding.

3. The Union argues that the Board's order did not go far enough and that the Company should have been require required to pay the Union's counsel fees and mail notices to each of its employees at every job location. The Board's wide discretion is at its broadest in matters of remedial

policy. *See Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 215-16 (1964). We cannot conclude that the Board has strayed beyond the zone of the permissible by issuing its standard decree directing the Company to bargain forthwith and post a notice to that effect.

*Petition for enforcement granted:*
*Petitions for review denied.*

**APPENDIX B**

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

SEPTEMBER TERM, 1969

---

**No. 21,969**

Truck Drivers & Helpers Local No. 728, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Petitioner,

v.

National Labor Relations Board,
Respondent,

Georgia Highway Express, Inc.,
Intervenor.

---

**No. 22,095**

Georgia Highway Express, Inc.,
Petitioner,

v.

National Labor Relations Board,
Respondent,

---

Truck Drivers & Helpers Local No. 728,
Intervenor.

Before: Bazelon, Chief Judge; Prettyman, Senior Circuit Judge; and Leventhal, Circuit Judge, in Chambers.

**Order**

On consideration of the petition for rehearing filed herein by counsel for Georgia Highway Express, Inc., it is

ORDERED by the Court that the aforesaid petition is denied.

*Per Curiam.*

## APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

**Case No. 10-CA-7158**

GEORGIA HIGHWAY EXPRESS, INC.

and

TRUCK DRIVERS & HELPERS LOCAL UNION No. 728

**Decision and Order**

Upon a charge filed by Truck Drivers & Helpers Local Union No. 728, herein called the Union, the General Counsel for the National Labor Relations Board, by the Regional Director for Region 10, issued a complaint dated January 5, 1968, against Georgia Highway Express, Inc., herein called Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing were duly served upon the Respondent.

With respect to the unfair labor practices, the complaint alleges, in substance, that on November 9, 1967, the Union was duly certified by the Regional Director for Region 10 as the exclusive bargaining representative of Respondent's employees in the unit found appropriate,[1] and that, since on or about November 20, 1967, and thereafter, Respondent has refused and is refusing to bargain

1. Case No. 10-RC-6679: Decision and Direction of Election, request for review of which was denied by the Board on June 28, 1966; Supplemental Decision, request for review of which was denied by the Board on November 2, 1966; Second Supplemental Decision and Order to Open and Count Challenged Ballots, review of which was denied by the Board on October 30, 1967.

collectively with the Union as such exclusive bargaining representative, although the Union has requested and is requesting it to do so. On January 18, 1968, Respondent filed its answer, which admitted in part and denied in part the allegations contained in the complaint, and requested that the complaint be dismissed. In sum, Respondent admitted that the Union, on November 10, 1967, requested bargaining, that Respondent, on November 20, 1967, refused to bargain but pleaded as a defense that "the Regional Director . . . designating the Union as the bargaining agent of this Respondent's employees was illegal and contrary to law, and, therefore, the Respondent has at no time been obligated under any valid law, statute, regulation or ruling to bargain with the Union . . ."

Thereafter, the General Counsel filed with the Board a Motion for Summary Judgment, dated February 12, 1968, alleging that Respondent seeks to relitigate issues presented, litigated, and decided by the Board in Case No. 10-CA-6581,[2] and asserting, in view of the admissions contained in the Respondent's answer, that there are no issues of fact or law requiring a hearing, and praying that the Board enter judgment against Respondent on the pleadings, make findings of fact as alleged and admitted in the answer, and conclude that, as a matter of law, Respondent has violated Section 8(a)(1) and (5) of the Act, as alleged in the complaint and order an appropriate remedy therefor. Thereafter, on February 15, 1968, the Board issued an Order Transferring Proceeding to the Board and Notice to Show Cause why the General Counsel's motion should not be granted. On February 29, 1968, the Respondent filed a response, requesting the Board to deny the Motion for Summary Judgment, or in the alternative to grant a hearing to permit the Respondent to present evidence in support of its answer and affirmative defense.

2. *Georgia Highway Express, Inc.*, 165 NLRB No. 80.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board makes the following:

*Ruling on the Motion for Summary Judgment*

In its response to the Notice to Show Cause, Respondent contends that in both the representation and complaint cases involving the Respondent sufficient evidence has never been presented for a determination on the eligibility to vote in the election of 57 persons whose ballots were challenged. Moreover, the Respondent contends that the complaint case, upon which the Regional Director relied in his decision of October 12, 1967, and in his subsequent certification, has been appealed to the United States Court of Appeals for the District of Columbia, and that the Motion for Summary Judgment should not be acted upon until a decision is forthcoming in such case. Accordingly, Respondent requests the denial of the Motion or a hearing to resolve the voting eligibility of the 57 employees. We find that this contention is without merit for the following reasons.

On April 20, 1966, the union filed a petition in Case No. 10-RC-6679 seeking to represent city drivers and various other employees at Respondent's Atlanta, Georgia, terminal, excluding over-the-road drivers, garage employees, and certain other individuals. After a hearing, the Regional Director for Region 10, on June 10, 1966, issued a Decision and Direction of Election in which he found, in accordance with the agreement of the parties, the following unit appropriate for collective bargaining:

> All city pickup and delivery drivers, helpers, warehousemen, dock clerks, hustlers, lift operators, and checkers, at the Employer's Atlanta, Georgia, terminal, but excluding all over-the-road drivers, mechanics, garage employees, office clerical employees, custodial employees, salesmen, guards, and supervisors as defined in the Act.

In his Decision, the Regional Director further found that approximately 42 individuals who participated in a work stoppage on April 12 and 13, 1966, were not eligible to vote as strikers, and were also ineligible to vote because they were permanently laid off employees who did not have a reasonable expectancy of employment in the near future.

On June 17, 1966, the Union filed a request for review of the Regional Director's Decision, in which it contended that, aside from the question of whether or not the employees in issue were unfair labor practice strikers which was not involved in these proceedings, at least said employees were economic strikers on layoff with a reasonable expectancy of recall. On June 24, 1966, the Respondent filed a statement in opposition to the Union's request for review, in which it argued that the findings of fact and Board precedent supported the Regional Director's Decision. Thereafter, on June 28, 1966, the Board, pending consideration of the Union's request for review, empowered the Regional Director at his discretion to conduct the election and to vote under challenge, the individuals who participated in the work stoppage on April 12 and 13, 1966, and to tally the ballots cast.

On June 29, 1966, an election by secret ballot was conducted among the employees of the appropriate unit. Upon conclusion of the balloting, the parties were furnished a tally of ballots which showed that of approxi-

mately 306 eligible voters, 122 cast valid votes for, and 163 cast valid votes against, the Union. There were 67 challenged ballots, which were sufficient in number to affect the results of the election. On July 5, 1966, the Union filed timely objections to the election and a copy thereof was timely served upon the Respondent.

On July 14, 1966, the Union filed a Motion, in which it submitted new evidence consisting of letters of recall sent to striking employees and requested that the Board consider such evidence and reopen the hearing.[3] On July 29, 1966, the Employer filed a response to the Union's Motion, in which it contended that the letters of recall did not affect the conclusion that such employees had no reasonable expectancy of being reemployed. The Employer accordingly asked that the Union's request be denied and that its Motion be dismissed without prejudice.

On August 26, 1966, the Board advised the parties that, as the request for review concerned the eligibility of individuals engaged in a work stoppage which also might be involved in the challenges to certain ballots, and in view of unfair labor practice charges relating to such individuals, the Board would make no disposition of the request for review, the Union's Motion, and the response thereto, until the Regional Director had investigated the challenges, the objections, and/or the unfair labor practice charges and had taken action on these matters. The Board also authorized the Regional Director to investigate the challenges and objections and to issue a Supplemental Decision or to take other appropriate action pursuant to the Board's Rules and Regulations.

Thereafter, on September 30, 1966, the Regional Director issued his Supplemental Decision in which he ruled

3. On July 20, 1966, the Union advised the Board that additional letters of recall had been received by other employees since the Motion was filed on July 14.

as follows: He found that the 5 objections were without merit and he overruled them; that Leamon Hood, Jr., was not an eligible voter because he was not an employee of the Employer on the eligibility date (June 14, 1966) or on the day of the election; and that the issue of the voting eligibility of 57 strikers listed in Appendix A of his Supplemental Decision could not be resolved until disposition of the unfair labor practice charges alleged in Case No. 10-CA-6581. As determination of the eligibility of the 57 individuals mentioned above might be determinative of the results of the election, he also deferred determination of the eligibility of 9 other individuals.[4] On October 18, 1966, the Union filed a request for review of the Regional Director's Supplemental Decision. Here the Union took issue with the disposition of an objection relating to a pre-election letter circulated by Respondent, and the Union requested a new election. The Union further contended that the Regional Director failed to decide issues referred to him for Decision by the Board and, if the Board did not intend the Regional Director to make such rulings, then the Union requested the Board to do so. In denying the Union's request for review on November 4, 1966, the Board noted that, as the Regional Director had not passed upon the challenges to ballots cast by individuals engaged in the work stoppage and the subject of 8(a)(3) charges, the issues raised by the Union in its earlier request for review concerning their eligibility remained preserved pending the Regional Director's disposition of the charges and the challenges.

On June 19, 1967, the Board issued its Decision and Order in *Georgia Highway Express, Inc.*, 165 NLRB No. 80, Case No. 10-CA-6581, in which it found that the em-

4. C. T. Bridewell, Ervin Chastain, David Dameron, T. L. Fincher, Edward E. Lacey, A. R. Slater, Wayne H. Coker, Tony Kite, and Gary Knight.

ployees participating in the work stoppage on April 12 and 13 were economic strikers who had unconditionally offered to return to work at noon April 13 and who had not been permanently replaced. Accordingly, the Board found that the Respondent violated Section 8(a)(1) of the Act by failing to reinstate the strikers promptly and therefore Respondent was ordered to reinstate all unreinstated strikers and to pay them backpay where necessary to make them whole for any loss of benefits due to such unlawful conduct. The strikers named in Case No. 10-CA-6581 included the names of the 57 alleged discriminatees who voted challenged ballots in the election in Case No. 10-RC-6679, and who are listed in Appendix A attached to the Regional Director's Supplemental Decision issued on September 30, 1966.

On October 12, 1967, the Regional Director issued his Second Supplemental Decision and Order to Open and Count Challenged Ballots. In this Decision, he noted the Board's Decision and Order in Case No. 10-CA-6581, *supra*, and accordingly ruled that the 57 individuals listed in Appendix A in his Second Supplemental Decision (the same as listed in Appendix A in the Supplemental Decision) were eligible voters and he overruled the challenges to their ballots. As the counting of the ballots of these 57 individuals might be determinative of the results of the election, he deferred ruling on the eligibility of the remaining 9 challenged ballots, and ordered that the challenged ballots of the individuals listed in Appendix A should be opened and counted, and if determinative of the election, that an appropriate certification should be issued.

On October 23, 1967, the Respondent filed a request for review of the Second Supplemental Decision. Respondent here argued that in the complaint case no evidence was presented which would show that the strikers had a reasonable expectancy of reemployment or that the Regional

Director's original decision in the representation case was erroneous; that the Board should reconsider its policy of determining representation questions in complaint cases; and that the challenged ballots should not be counted during the pendency of an appeal on the complaint case to the United States Court of Appeals. The Respondent urged the Board to reverse the Second Supplemental Decision or to set it aside and order a hearing to receive further evidence. On October 31, 1967, the Board denied the Respondent's request for review of the Regional Director's Second Supplemental Decision. On November 9, 1967, the Union was certified as the exclusive bargaining representative of the employees in the appropriate unit.[5]

In its response to the Notice to Show Cause, the Respondent contends that no evidence was ever taken by the Regional Director to ascertain whether or not the individuals who cast the 57 challenged ballots which were opened and counted on November 3, 1967, were ever employees of Respondent within the meaning of the Act even though Respondent had made numerous requests for such a hearing. Respondent further cites the original Decision of the Regional Director of June 10, 1966, holding that 42 of the 57 employees whose ballots were challenged were not employees of the Respondent. Finally, Respondent argues that the Board's Decision in the complaint case merely held that Respondent did not sustain the burden of proving that it had replaced the strikers on a particular date, and that there is no decision as to any particular employee, as is reflected in footnote 14 of the Decision in the complaint case. Respondent further argues that the Motion for Summary Judgment should not be ruled upon

5. The revised tally of ballots shows that of 306 eligible voters, 178 ballots were cast for, and 164 against, the Union and there were 9 challenged ballots. The remaining challenges were insufficient in number to affect the results of the election.

until the United States Court of Appeals has made a decision on the complaint case.[6]

It is clear that the strikers named in the charge in the complaint case include the same 57 employees named in the representation case and set forth in Appendix A to the Regional Director's Supplemental and Second Supplemental Decision. Moreover, in Respondent's request for review received by the Board on October 23, 1967, Respondent admits that the 57 employees who cast challenged ballots in the election on June 29, 1966, did engage in the work stoppage and thus were strikers. Further, the Board in the complaint case unequivocally held that the unreinstated strikers who took part in the work stoppage on April 12 and 13, unconditionally applied for reinstatement on April 13, and had not been permanently replaced as of that date. As a matter of law then, these strikers, from the time they applied for reinstatement until the Respondent made them a valid offer of reinstatement, were employees. It is not contended here and the evidence in the entire records in the complaint and representation cases do not show that any of the 57 strikers here in issue were offered reinstatement or that they refused such an offer prior to the election of June 29, 1966. It is therefore clear that the complaint case, in which a hearing was duly conducted, and at which time the Respondent had every opportunity to present all relevant evidence, completely disposes of the issues here raised by Respondent. Accordingly, Respondent is now attempting to relitigate the identical issues which the Board and the Court have resolved in Case No. 10-CA-6581. Moreover, Respondent does not now offer to adduce any newly discovered or previously unavailable evidence. Nor does the Respondent allege that

6. The Board's order has since been affirmed. *Truck Drivers and Helpers Local No. 728, I.B.T.* v. *N.L.R.B. et al.; Georgia Highway Express, Inc.* v. *N.L.R.B. et al.*, 67 LRRM 2992 (App. D. C. April 18, 1968).

any special circumstances exist which would require the Board to reexamine its court enforced decision in the complaint proceeding, or the underlying representation proceeding.

All material issues having been either decided by the Board and by the Court or admitted in the answer to the complaint, there are no matters requiring a hearing.[7] Accordingly, the General Counsel's Motion for Summary Judgment is granted.

On the basis of the record before it, the Board makes the following:

*Findings of Fact*

I. *The Business of the Respondent*

The Respondent is and at all times material herein has been a Georgia corporation engaged as a common carrier by motor vehicle in the interstate transportation of freight, with its principal office at Bibb county, Georgia, and a terminal at Atlanta, Georgia. In the course of its business, Respondent during the past 12 months, which period is representative of all times material herein, received in excess of $50,000 from the interstate transportation of freight.

Respondent admits, and we find, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. *The Labor Organization Involved*

Truck Drivers & Helpers Local Union No. 728 is a labor organization within the meaning of Section 2(5) of the Act.

---

7. An evidentiary hearing is not a matter of right where there is nothing that a trier of fact may determine. *E-Z Davie's Chevrolet*, 161 NLRB No. 121.

III. *The Unfair Labor Practices*

A. *The representation proceeding*

1. *The unit*

At all times material herein the following employees at the Respondent's terminal in Atlanta, Georgia, have constituted and now constitute a unit appropriate for purposes of collective bargaining within the meaning of the Act:

> All city pickup and delivery drivers, helpers, warehousemen, dock clerks, hustlers, lift operators, and checkers, at the Employer's Atlanta, Georgia, terminal, but excluding all over-the-road drivers, mechanics, garage employees, office clerical employees, custodial employees, salesmen, guards, and supervisors as defined in the Act.

2. *The certification*

On June 29, 1966, a majority of the employees of Respondent in said unit, voting in a secret election conducted under the supervision of the Regional Director for Region 10, designated the Union as their representative for the purposes of collective bargaining with Respondent, and on November 9, 1967, the Regional Director certified the Union as the collective-bargaining representative of the employees in said unit and the Union continues to be such representative.

B. *The request to bargain and Respondent's refusal*

Commencing on or about November 10, 1967, and continuing to date, the Union has requested, and is requesting, the Respondent to bargain collectively with it as the exclusive bargaining representative of the employees in the appropriate unit with respect to their wages, hours, and working conditions. The Respondent admittedly refused, and has continued to refuse, to bargain with the Union as

exclusive collective-bargaining representative of the employees in said unit.

Accordingly, we find that the Union was duly certified as the collective-bargaining representative of the employees of the Respondent in the appropriate unit described above in the Board's certification, and that the Union at all times since November 9, 1967, has been and now is the exclusive bargaining representative of the employees in the foresaid unit, within the meaning of Section 9(a) of the Act. We further find that the Respondent has, since November 20, 1967, refused to bargain collectively with the Union as the exclusive bargaining representative of its employees in the appropriate unit, and that, by such refusal, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. *The Effect of the Unfair Labor Practices upon Commerce*

The acts of the Respondent set forth in Section III, above, occurring in connection with its operations as described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. *The Remedy*

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in

the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.[8]

*Conclusions of Law*

1. Georgia Highway Express, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Truck Drivers & Helpers Local Union No. 728 is a labor organization within the meaning of Section 2(5) of the Act.

3. All city pickup and delivery drivers, helpers, warehousemen, dock clerks, hustlers, lift operators, and checkers, at the Employer's Atlanta, Georgia, terminal, but excluding all over-the-road drivers, mechanics, garage employees, office clerical employees, custodial employees, salesmen, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 9, 1967, the above-named labor organization has been the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

---

8. On April 26, 1968, the Union filed a Motion requesting extraordinary remedies in the instant case. The Union requests that Respondent be ordered to pay the attorney's fees and expenses of litigation of the General Counsel and the Charging Party; that Respondent be required to mail a copy of the cease and desist order to each employee of Respondent at every job location, post the order at each job location, and read the same during working hours to all of its employees at each job location; that any contract entered into subsequent to the instant order containing wage increases or other benefits be made retroactive to November 20, 1967, the date of the original refusal to bargain. We deem it inappropriate in this case to depart from our existing policy with respect to remedial orders in cases involving violations of Section 8(a)(5). We therefore deny the Union's Motion.

5. By refusing on or about November 20, 1967, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Georgia Highway Express, Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment with Truck Drivers & Helpers Local Union No. 728 as the exclusive and duly certified bargaining representative of its employees in the following appropriate unit:

> All city pickup and delivery drivers, helpers, warehousemen, dock clerks, hustlers, lift operators, and checkers, at the Employer's Atlanta, Georgia, ter-

minal, but excluding all over-the-road drivers, mechanics, garage employees, office clerical employees, custodial employees, salesmen, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization, as the exclusive representative of all employees in the aforesaid appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Atlanta, Georgia, terminal, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director for Region 10, in writing, within 10 days from the date of this Decision and

8. In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order," the words "a Decree of the United States Court of Appeals, Enforcing an Order."

Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D. C., May 24, 1968.

Gerald A. Brown, Member
Howard Jenkins, Jr., Member
Sam Zagoria, Member

(Seal) National Labor Relations Board

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
FEB 9 1970
JOHN F. DAVIS, CLERK

No. 1044

# In the Supreme Court of the United States

OCTOBER TERM, 1969

GEORGIA HIGHWAY EXPRESS, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD
AND TRUCK DRIVERS & HELPERS LOCAL NO. 728

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

ARNOLD ORDMAN,
*General Counsel,*
DOMINICK L. MANOLI,
*Associate General Counsel,*
NORTON J. COME,
*Assistant General Counsel,*
LINDA SHER,
*Attorney,*
*National Labor Relations Board,*
*Washington, D.C. 20570.*

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| Argument | 8 |
| Conclusion | 11 |


## CITATIONS

Cases:


| | |
|---|---|
| *Georgia Highway Express, Inc.* v. *National Labor Relations Board*, 393 U.S. 935 | 5 |
| *National Labor Relations Board* v. *Difco Laboratories, Inc.*, 389 F. 2d 663, certiorari denied, 393 U.S. 828 | 8 |
| *National Labor Relations Board* v. *National Survey Service, Inc.*, 361 F. 2d 199 | 8 |
| *National Labor Relations Board* v. *Rexall Chemical Co.*, 370 F. 2d 363 | 10 |
| *National Labor Relations Board* v. *Sun Drug Co.*, 359 F. 2d 408 | 8, 10 |
| *Neuhoff Bros. Packers, Inc.* v. *National Labor Relations Board*, 362 F. 2d 611, certiorari denied, 386 U.S. 956 | 8 |
| *Rockwell Manufacturing Co.* v. *National Labor Relations Board*, 330 F. 2d 795, certiorari denied, 379 U.S. 890 | 8, 9, 10 |
| *Truck Drivers & Helpers Local No. 728, IBT* v. *National Labor Relations Board*, 403 F. 2d 291 | 5 |
| *United States* v. *Tucker Truck Lines*, 344 U.S. 33 | 10 |

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

| | Page |
|---|---|
| Section 8(a)(1) | 4, 6 |
| Section 8(a)(5) | 6 |

# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1044

GEORGIA HIGHWAY EXPRESS, INC., PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD
AND TRUCK DRIVERS & HELPERS LOCAL NO. 728

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1–8) is reported at 415 F. 2d 986. The Board's decision and order (Pet. App. A, 11–26) are reported at 171 NLRB No. 111.

### JURISDICTION

The judgment of the court of appeals was entered on September 8, 1969, and a timely petition for rehearing was denied on October 10, 1969 (Pet. App. A, 9–10). The petition for a writ of certiorari was filed on January 8, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Board properly refused to allow relitigation in an unfair labor practice case of an issue which either had or could have been determined in a prior, underlying representation proceeding.

## STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the petition (Pet. 3–4). Also relevant is Section 8(a)(5) of the Act, which provides:

> It shall be an unfair labor practice for an employer—
>
> > to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

## STATEMENT

On April 12 and 13, 1966, some 116 employees working at the petitioner Company's Atlanta, Georgia, terminal engaged in a strike, protesting conditions of employment. At noon on April 13, most of the employees unconditionally asked for reinstatement, which request the Company refused (Pet. App. A, 19; R. 10, 87–90).[1]

On April 20, 1966, Truck Drivers Local Union No. 728 filed a petition for an election, seeking to represent the Company's city drivers and various other

[1] "R." references are to the Appendix to the parties' briefs filed in the court below.

employees (Pet. App. A, 13). After a hearing was held on June 10, 1966, the Regional Director ordered a representation election in which, he held, approximately 42 individuals who participated in the April 12 and 13 work stoppage would be ineligible to vote, because they were permanently laid-off employees who did not have a reasonable expectancy of reemployment in the near future (Pet. App. A, 13–14; R. 14–16). On June 17, 1966, the Union filed a request for review of the Regional Director's decision, contending that the employees were "economic strikers on layoff with a reasonable expectancy of recall" in the near future, and therefore should be allowed to vote in the election (Pet. App. A, 14; R. 17–18). On June 28, 1966, the Board, pending consideration of this request for review, empowered the Regional Director to conduct the election and to allow the individuals who participated in the work stoppage to vote under challenge (Pet. App. A, 14; R. 35). The election was held on June 29, 1966, with 122 ballots cast for the Union, 163 against, and 67 ballots challenged, a number sufficient to affect the outcome (Pet. App. A, 14–15; R. 37).

In the meantime, on June 13, 1966, the Union had filed the first of several unfair labor practice charges against the Company, protesting the discriminatory treatment of 57 employees who participated in the strike (R. 85). On August 26, 1966, the Board advised the parties that, since the Union's request for review of the Regional Director's decision concerned the

eligibility of individuals engaged in a work stoppage who might also be involved in the challenges to certain ballots, and since unfair labor practice charges relating to such individuals had been filed, it would make no further decision in the representation case at that time. Instead, it would stay its hand until the Regional Director had investigated the challenges to the ballots, the objections to the election which the Union had filed and the unfair labor practice charges, and had taken appropriate action (Pet. App. A, 15; R. 53). Thereafter, on September 30, 1966, the Regional Director issued a supplemental decision in which, *inter alia,* he overruled the Union's objections to the election but deferred resolving the issue of the voting eligibility of 57 named strikers until disposition of the unfair labor practice charges, which alleged that those individuals had been unlawfully denied reinstatement by the Company (Pet. App. A, 15–16).

A complaint in the unfair labor practice case issued on October 5, 1966, and a hearing ensued before a trial examiner (R. 85). On June 19, 1967, the Board issued its decision in that case. It found that the employees participating in the April work stoppage were economic strikers who had unconditionally offered to return to work at noon on April 13, 1966, and who had not been permanently replaced. Accordingly, it determined that, under settled principles, the Company had violated Section 8(a)(1) of the Act by failing to reinstate the strikers promptly, and ordered,

*inter alia,* the reinstatement of these employees (Pet. App. A, 16–17; R. 99–101, 105–106).[2]

On October 12, 1967, the Regional Director issued his second supplemental decision in which, upon noting the Board's decision in the companion unfair labor practice case, he ruled that the 57 individuals were eligible voters and ordered that their ballots be counted (Pet. App. A, 17; R. 118–120).

On October 23, 1967, the Company filed a request for review of the Regional Director's second supplemental decision, arguing, *inter alia,* that in the unfair labor practice case no evidence was presented which would show that the strikers had a reasonable expectancy of reemployment, and that the Regional Director's original decision of June 10, 1966, should be upheld (Pet. App. A, 17–18; R. 120–128). On October 31, 1967, the Board denied the request for review (Pet. App. A, 18; R. 133).

The 57 challenged ballots were opened and counted; the revised tally showed that 178 ballots were cast for the Union, and 164 against (Pet. App. A, 18, n. 5; R. 139–140). On November 9, 1967, the Regional Director certified the Union as the exclusive bargaining representative of the employees in the appropriate unit (Pet. App. A, 18; R. 141–142). The Company refused the Union's request for recognition and bargaining

[2] The Board's order, reported at 165 NLRB No. 80, was enforced in *Truck Drivers & Helpers Local No. 728, IBT* v. *National Labor Relations Board*, 403 F. 2d 921 (C.A.D.C.), certiorari denied *sub nom. Georgia Highway Express, Inc.* v. *National Labor Relations Board*, 393 U.S. 935.

(Pet. App. A, 12; R. 153, 154–156), the Union filed unfair labor practice charges, and the Board's General Counsel issued a complaint alleging that such refusal violated Section 8(a)(5) and (1) of the Act (Pet. App. A, 11). The Company's answer admitted the refusal to bargain, but asserted that such refusal was lawful since the Union's certification was invalid because of the absence of any showing, in the prior unfair labor practice proceeding, "that the persons named on the charges were or ever had been employees" of the Company (Pet. App. A, 12; R. 150).

The Board's General Counsel thereupon moved for summary judgment on the ground that the only issues raised in defense had already been fully litigated and determined adversely to the Company in the earlier unfair labor practice proceeding (Pet. App. A, 12; R. 157–160). Subsequently, on February 15, 1968, the Board issued an order transferring the proceeding from a trial examiner to the Board, with a notice to show cause why the General Counsel's motion should not be granted (Pet. App. A, 12; R. 160–161). The Company filed a response on February 29, 1968, requesting the Board to deny the motion, or in the alternative, to grant a hearing to permit the Company to present evidence in support of its answer (Pet. App. A, 12; R. 172–176). The Company argued, in part, that no evidence was ever "taken by the Regional Director to ascertain whether or not the 57 challenged ballots * * * were ever employees of the [Company]," or whether they were employees "either

at the time of the casting of said ballots or thereafter * * *," and that it had been denied a hearing to present evidence with respect thereto (R. 173, 174–175).

The Board found, however, that the employee status of the 57 challenged voters and their eligibility to vote had been determined in the prior unfair labor practice case decided during the pendency of the representation proceeding; that the Company was merely attempting to relitigate the identical matters which had been resolved in those proceedings; and that it did not offer to adduce any newly discovered or previously unavailable evidence, nor allege any special circumstances which would require the Board to reexamine its court-enforced decision in the earlier unfair labor practice case or the representation proceeding (Pet. App. A, 19–20). Accordingly, the Board, granting the General Counsel's motion for summary judgment, found that the Union was duly certified as the collective bargaining representative of the Company's employees in the appropriate unit described in the Board's certification, and that the Company's admitted refusal to bargain had therefore violated Section 8(a)(5) and (1) of the Act (Pet. App. A, 22). The Board ordered the Company to bargain with the Union upon request (Pet. App. A, 24–25).

The court of appeals enforced the Board's order. It held that the Company had its "day in court" in the first unfair labor practice and representation proceedings to litigate the "key question" of the employee status, and eligibility to vote, of the 57 individuals

whose votes were challenged. Accordingly, the court concluded that the Board had not abused its discretion in refusing to permit the Company to relitigate these issues in the second unfair labor practice case involving the Company's failure to recognize the previously certified Union. (Pet. App. A, 4–7.)

## ARGUMENT

It has long been recognized that, when an unfair labor practice proceeding is simply a means of enforcing the Board's determination in a representation case, the two proceedings "are really one" and "a single trial of the [representation] issue [is] enough." *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U.S. 146, 158, 162. The courts have uniformly approved the Board's rule that, absent extraordinary circumstances, they will not permit relitigation in the unfair labor practice case of issues which have been or should have been litigated in the underlying representation proceeding.[6]

Petitioner does not challenge this settled practice. The crux of its contention here (Pet. 8, 12) is that the employee status of the individuals who the Board found in the first unfair labor practice case had been

[6] *National Labor Relations Board* v. *National Survey Service, Inc.*, 361 F. 2d 199, 201–202, 204, 206 (C.A. 7); *Neuhoff Bros. Packers, Inc.* v. *National Labor Relations Board*, 362 F. 2d 611, 612–613 (C.A. 5), certiorari denied, 386 U.S. 956; *National Labor Relations Board* v. *Difco Laboratories, Inc.*, 389 F. 2d 663 (C.A. 6), certiorari denied, 393 U.S. 828; *National Labor Relations Board* v. *Sun Drug Co.*, 359 F. 2d 408 (C.A. 3); *Rockwell Manufacturing Co.* v. *National Labor Relations Board*, 330 F. 2d 795, 797 (C.A. 7), certiorari denied, 379 U.S. 890.

unlawfully denied reinstatement on April 13, 1966, was not determinative of their eligibility to vote in the June 1966 election; that no hearing was afforded to petitioner in either the representation or unfair labor practice case with respect to the eligibility issue; and that therefore the bar against relitigation is inapplicable here. But, as the court of appeals pointed out, petitioner failed to raise this issue with any meaningful specificity at the representation stage of the present proceedings; nor did it offer to tender any evidence bearing upon the voting eligibility issue other than the evidence upon which it had unsuccessfully relied in the first unfair labor practice case in arguing that the employees were not entitled to reinstatement on April 13, 1966. As the court below further pointed out, petitioner merely offered to present evidence "'to show that the employees were replaced and had no reasonable expectancy of reemployment at the time of election'—wording also applicable to persons claimed to be without employee status on April 13" (Pet. App. A, 6). Indeed, even now petitioner does not indicate what other evidence it would adduce in support of its claim that the 57 employees had become ineligible to vote between April 13, when it unlawfully denied the request for reemployment, and the June election.

In these circumstances, the Board was not required in the second unfair labor practice case to consider "new allegations and evidence pertinent to the representation issue, which could have been advanced at the earlier stage." *Rockwell Manufacturing Co.* v.

*National Labor Relations Board,* 330 F. 2d 795, 797 (C.A. 7), certiorari denied, 379 U.S. 890. Cf. *United States* v. *Tucker Truck Lines,* 344 U.S. 33, 36–37. To allow petitioner another hearing on this already litigated issue would run counter to the Board's consistent and salutary practice in such situations. That practice is grounded on the premise that, since the prompt disposition of timely objections or challenges in representation proceedings is a critical element in election cases, representation issues should be finally resolved at that stage rather than, perhaps months later, at the hearing on an unfair labor practice complaint based upon the underlying representation proceeding. All those courts which have considered the matter have agreed. *E.g., National Labor Relations Board* v. *Rexall Chemical Co.,* 370 F. 2d 363, 366 (C.A. 1); *National Labor Relations Board* v. *Sun Drug Co.,* 359 F. 2d 408, 414 (C.A. 3).

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

ARNOLD ORDMAN,
*General Counsel,*
DOMINICK L. MANOLI,
*Associate General Counsel,*
NORTON J. COME,
*Assistant General Counsel,*
LINDA SHER,
*Attorney,*
*National Labor Relations Board.*

FEBRUARY 1970.

U.S. GOVERNMENT PRINTING OFFICE 1970